

Commercial



ESTABLISHED JULY 3, 1854.

Advertiser.

VOL. XXXV., NO. 6331.

HONOLULU, HAWAII TERRITORY, FRIDAY, NOVEMBER 21, 1902.

PRICE FIVE CENTS.

AUSTIN IS STILL KEPT OUT

Gear's Order Had But Little Effect.

DENIES POWER OF THE GOVERNOR

The Second Judge Relies on a Newspaper Report in His Decision.

Judge Gear yesterday ordered H. C. Austin restored to office as auditor, but the order was not obeyed. Austin made a forcible attempt to regain possession, by virtue of a peremptory writ of mandamus, but an officer barred his way. In the meantime Gear's order was rendered null and void by an appeal to the Supreme Court, and Austin's case will probably be effectually disposed of by the Senate before any further court proceedings can be taken. There was some talk of contempt proceedings, but no action had been taken by the attorneys or the court yesterday.

Judge Gear rendered his decision a little before eleven o'clock yesterday morning and signed the peremptory writ at once.

He read only a few paragraphs from the decision in court yesterday morning and it was not until after the attempt had been made to regain possession of the office by Austin that the opinion was filed. In his decision Judge Gear held after quoting numerous authorities and the Organic Act relating to appointments:

"This provision is peculiar as it does not occur in any other law that I have been able to find. The statement therein would be the law without its insertion in the section, for it is abundantly shown by all the authorities that where an appointment is made 'by and with the advice and consent of the senate,' no removal can be made except by and with the consent of the Senate. . . .

"There are some authorities holding, however, that in the national government the President has the power of removal of officers whose appointment is made by and with the advice and consent of the Senate.

"These decisions place the National Government on a different footing from State or Territorial Governments. It may be that because of the power exercised by the President of the United States, Congress thought that a like power might be exercised by the Governor. They made the law on this jurisdiction certain, however, by the insertion of this provision giving the right to remove officers to the Governor only by and with the advice and consent of the Senate."

Referring to Hawaiian laws the decision says: "This statute allowing the suspension or removal of these officers by the Governor, regardless of the advice and consent of the Senate, is absolutely incompatible with and directly contrary to section 30 of the Organic Act, which requires the advice and consent of the Senate for their removal from office. . . . It is clear to my mind that a careful study of the Organic Act, in connection with the Audit Act, would show that the Organic Act, in its provision as to appointment tenure and removal of officers therein named, is exclusive and annuls sections 1, 2 and 8 of the Audit Act, providing for appointment and removal of the Auditor and Deputy Auditor.

"The question then arises as to the power of the Governor irrespective of statute to remove or suspend an officer duly appointed who—as we will admit for the purposes of this discussion—committed malfeasance in office. . . .

"It seems to be clear that an officer can only be removed in accordance with some provision of law and the power of removal must be exercised within the limits fixed. In this case the office of Auditor is an office created by the constitution whose term of office is fixed and there is no inherent power in the Governor to remove such an officer, but his powers are limited and circumscribed by the law.

"The Territory of Hawaii is in a pe-

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LIGHT ON LABORERS

Builders Start New Inquiry Into All the Conditions.

Full and complete investigation of the labor situation alone will satisfy the members of the Builders and Traders' Exchange before they agree to the resolution of the Merchants' Association in relation to the admission of Chinese labor into the Territory. This was indicated during all the discussions of the Exchange had at the regular meeting last night, and the scope which it is desired shall be taken in the proposed inquiry is shown in the following resolution, passed after the discussion of more than two hours:

Whereas the Merchants' Association of Honolulu has asked this Exchange to endorse that portion of the memorial to the sub-committee on Hawaiian affairs of the Committee on Pacific Islands and Porto Rico of the United States Senate presented by said Association, in which Congress is petitioned to permit Chinese laborers to enter this Territory to engage in agricultural pursuits only, deportation to be the penalty of violating this provision;

And Whereas the sugar industry is the sole agricultural pursuit for which this labor is sought, and said industry in this Territory is now suffering owing to insufficient and unreliable labor;

And Whereas said Merchants' Association affirm that the only reason for asking Congress to admit such labor into this Territory is "to fill the great gaps in the ranks of (sugar plantation) field hands" and that such laborers "would not displace a single white man from any position or in any sense enter into competition with any white artisan, mechanic or common laborer;"

And Whereas almost the entire Oriental population of this Territory, which in 1900 was 36,878 against 67,123 persons of all other races combined, was originally brought to Hawaii to engage in agricultural pursuits only and in 1901 the Governor reported to the Secretary of the Interior that only 32,513 Asiatics were employed on Hawaiian sugar plantations, leaving approximately 36,000 male Asiatics not employed on sugar plantations;

And Whereas nearly every sugar plantation in Hawaii is today employing Asiatics not only as field laborers but as mill hands, carpenters, engineers and in other mechanical pursuits to the injury of white men or Hawaiians seeking such positions;

Resolved by The Builders & Traders' Exchange of Honolulu, Hawaii, representing the great majority of the employers of skilled labor in this Territory engaged in the building and manufacturing lines (aside from the manufacture of sugar) and the firms handling the various materials and supplies used in said lines of business;

First. That a Committee of eight members of this Exchange, representing, as near as may be, the several trades, industries and material supply houses connected with this Exchange, be appointed by the President, which Committee, with the President, who shall be chairman thereof, shall be charged with the investigation of the following matters, to wit:

1. To what extent have Oriental laborers heretofore brought to Hawaii to engage in Agricultural pursuits only displaced white men or Hawaiians from positions or in any sense entered into competition with any white or Hawaiian artisan, mechanic or common laborer.

2. Cannot the shortage in labor supply at present felt by the sugar plantations be supplied from among the 36,000 Orientals at present resident in this Territory and not employed on the sugar plantations?

3. Would not an amendment to the alien contract labor law permitting the importation of Portuguese satisfactorily supply the labor needed by the sugar plantations?

4. The superiority of Chinese over the present Japanese cane field labor being conceded by the Merchants' Association, what guarantees have the Merchants' Association of Honolulu and the Hawaiian Sugar Planters' Association to offer that, upon being permitted to import Chinese cane field labor, they would not import such labor in quantities which would, to a greater or less extent, supplant the Japanese now so employed and that the Japanese thus forced from the sugar plantations would not displace white men from positions or in any sense enter into competition with any white or Hawaiian artisan, mechanic or common laborer and thus make it increasingly difficult "to promote trade, mechanical and industrial interests by fostering in this community a sentiment in favor of retaining at least a portion of the business of this city for the benefit of American citizens or those eligible to become such and developing this community on traditional American lines," the main object for which this Exchange was organized.

5. Would the members of the Hawaiian Sugar Planters' Association be willing to discharge every Oriental not

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GEAR'S ACTION IS CRITICISED

Davis Says He Exceeds His Authority in Issuing Mandamus in Boyd Case.

Contended That the Restoration of Superintendent to Office Would Be an Unlawful Interference With the Governor's Power.

Following closely upon the heels of the decision in the Austin case, George A. Davis, appearing for Henry E. Cooper in the Boyd matter, attacked the power of Judge Gear to grant a writ of mandamus. He claimed that the second judge exceeded his authority in attempting to control the executive acts of Governor Dole, contending in spite of the Austin decision, that the Governor did have the right to suspend Boyd. Even granting the power of the court to grant a writ of mandamus, Davis insisted that such "power was wholly discretionary, and should not be exercised in the Boyd case, where the official kept out of office was under indictment for embezzlement, and it would work public mischief to have him reinstated.

A. S. Humphreys, counsel for Boyd, was not present during the argument, but his interests were well taken care of by Judge Gear himself, who ably presented the petitioner's case in answer to Davis's argument. Humphreys appeared only at the opening and then left the court room saying he had no wish to make an argument.

Davis then asked that the mandamus be dissolved, as the answer of Cooper stood undenied, and neither Boyd nor his counsel were present in court. Gear contended, however, that the answer of Cooper did not deny the appointment of Boyd to his office, and that consequently no proof was required of him. Gear intimated half a dozen times during the argument that he would decide in favor of Boyd.

P. D. Kellet, Jr., was put on the stand to prove, in addition to the allegations of embezzlement made by Cooper in his answer, that three indictments had been returned against Boyd by the grand jury.

"The petitioner must make out his case," contended Davis. "He must be present at the hearing and prove the allegations in the complaint. If your honor issues a writ of mandamus in this case, it is simply the forcing into the Governor's Council a man who is charged with the crime of embezzlement, and who has been indicted for it. The statutes give the Governor the power to suspend an official, and I contend that the laws of the Republic are still in force, and sections 66 and 68 of the Organic Act give the executive full power. If this power is not here, then Congress gave us a statute which gives the courts a power to turn against the law. If there is no power to suspend an official charged with embezzlement then there is no power here to enforce the law. The Governor is not bound to call the Senate in extraordinary session; between sessions he may act alone.

"In Governor Sanford B. Dole is vested almost kingly powers in his executive acts, powers which no court can control or coerce by writ of mandamus. The Governor is not a party to this action, but the writ of mandamus goes out to coerce him into placing a man into office indicted by a grand jury and not proved not guilty, and you are exceeding your powers in that."

"If the Governor had the power of suspension, why did he ask Congress to give him that power in his recommendation to the Secretary of the Interior?" questioned Gear.

"I suppose he wanted to get express power, but this is not in evidence in this court, and not in the case at all," replied Davis.

"Even if the power of mandamus does lie," continued the attorney, "the court is not compelled to exercise it. It is a matter entirely in your discretion, you can issue a writ or not; and it should be issued only to prevent a denial of justice. It is certainly not a denial of justice to keep a man out of office who

is awaiting trial by jury for embezzlement, nor is it justice to force upon the Governor and the taxpayers and put into office a man who cannot be trusted. The United States Supreme Court says that mandamus should never issue where public mischief is likely to ensue. You have no right to interfere with the discharge of the executive duties of Sanford B. Dole."

"He can do anything he wants to, I suppose," interrupted Gear.

"No he can't; he cannot kill a man or embezzle money, but with his executive acts you have nothing to do. The United States Supreme Court has so held, and you have no right to interfere. As well might Sanford B. Dole come over here and tell you what to do with your bailiff, as for you to try to control him with writs of mandamus. You cannot question his legal power, especially at this time where corruption and loot are rife in the land. In this hour of public danger you should hesitate, your power being discretionary, before issuing writs of mandamus. Why if the Governor didn't suspend Boyd he ought to be indicted by the grand jury, for leaving in office a man who embezzled public moneys. He is given his power by the same hand that gives you the power of life and death, of issuing the highest orders, gives you the power almost of a despot. He is given all the powers of the President and the Cabinet and the Executive Council.

"How can Cooper give Boyd his office?" asked Davis.

"By getting out," replied Gear.

"No, he can't," answered Davis. "The police are there to prevent Boyd from getting back, even if you did issue a writ it would be non-operative for it is not directed to Sanford B. Dole, and Sanford B. Dole would instruct the same man to prevent him from taking more money or papers from the office."

Davis contended that Cooper had no power to give back Boyd's office and that he was not restraining him from holding his office. Several times during Davis' argument, the court became angered and refused to listen to him, ordering him to desist. Just at the close Gear ordered the attorney to stop argument upon Dole's right to suspend, and Davis persisting, Gear ordered a recess until this morning, with Davis still talking. No decision was rendered, though Gear left no doubt as to what it would be, intimating strongly that it would be the same as in the Austin case.

COUNTY BILL IS PROGRESSING

Commissioners Hard at Work on a Measure Fitting Conditions.

At a fully attended meeting held yesterday afternoon, the Republican Commission which has in charge the framing of bills for county and city government, went over and tentatively decided many points which will affect the work of United States District Attorney Breckons, who has been engaged to carry on the work of filling in the skeleton of the county bill.

The first draft was made from the bases of the Wyoming act, and the plan now under consideration is the getting into the bill of such points from the California county measure as will make it more fitting to local conditions. The greatest difficulty being encountered is getting around the points which seem to be so clearly established in the Organic Act as to leave little room for municipal legislation in connection with them. The attorneys on the commission are keeping the Organic Act in constant contemplation and find many snags in adapting the measures of mainland states to this Territory, by reason of that act.

It is understood that the date for the taking effect of the bill, and the manner of holding the first elections, as well as the provisions for revenue for carrying on the counties for the first months until the local taxes begin to come in, are points upon which the commissioners are spending some time in consideration.

CONVOCAION HAS CLOSED

Will Provide Home for Bishop of Diocese.

The first Episcopal Convocation of the Honolulu district since the Americanization of the church closed last evening, after a most successful three days' session. The final business was the election of the officers of the council for the ensuing year and the appointment of a committee to raise a fund for the purchase of a house for the Bishop of the Diocese. There was, at the very close, a faint echo of the old trouble in the Episcopal church, but it was successfully stifled without display of anything but unity and good will.

The election of officers was the first business disposed of at the closing session last evening.

The deputies elected to the General Episcopal convention to be held in Boston in 1904 were: Clerical, Rev. Canon Ault; lay, W. R. Castle, Jr. Provisional deputies: Clerical, Rev. Alexander McIntosh; lay, T. Clive Davies.

For chancellor of the Diocese, Hon. W. L. Stanley was chosen. Bishop Restarick nominated Judge Stanley for the position, stating that he appreciated the objection to Mr. Highton, and that the latter had recommended to him the appointment of Stanley. Mr. Davies and Mr. Testa stated that any objection made by them on the previous evening to Mr. Highton was withdrawn and they were willing to vote for him if nominated.

The Board of Directors as previously constituted was then elected, with the exception of Rev. Canon Kitcat, the name of Rev. John Osborne being substituted in his place. The board as now constituted consists of Rev. William Ault, Rev. John Osborne, L. Asea, W. R. Castle, Jr., Solomon Meheula, Henry Smith and Edmund Stiles.

For registrar, Edmund Stiles, the former incumbent, was unanimously elected. The election of the Board of Equalization resulted in the choice of T. Clive Davies, Edmund Stiles and C. Young.

Henry Smith was elected as treasurer of the Council, and also for the Board of Missions.

On the Board of Missions were elected Rev. John Osborne, Rev. Frank Fitz, P. H. Dodge, and Major Davis. Bishop Restarick and Treasurer Smith are also members of this board.

Rev. Mr. Osborne then brought up the matter of providing a house for the Bishop, and Bishop Restarick relinquished the chair to Rev. Alex. Mackintosh during the discussion that followed. Mr. Osborne suggested that a fund be started by the diocese and that the matter should be disposed of before adjournment.

Mr. Davies suggested that the same committee be charged also with the collection of the Bishop's stipend. He spoke of the guarantee which had been made by the Second Congregation to the General Convention in San Francisco to pay a Bishop, in case the local church was taken under the American jurisdiction, and thought that the matter should also be settled, and not be allowed to burden the signers of the guarantee.

F. J. Testa did not believe the matter of the bishop's house was properly before the council, as it should go to the individual parishes, but Mr. Osborne replied that this was entirely a matter for the diocese.

Rev. Canon Kitcat also favored immediate steps being taken to provide a home for the Bishop but did not think the matter of the guarantee had anything to do with this proposed fund.

Bishop Restarick sought to end the discussion as to the guarantee by stating that his salary was paid by the Mission Board of New York and would be continued as long as he lived. If there was any guarantee collected it would necessarily have to go to the general fund.

The Bishop stated also that if any fund was raised it could be used to endow the Episcopal, and spoke of a fund of \$100,000 which had been donated

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SENATE'S SESSION NOW ON

Republicans Take Up Work of Leading.

ORGANIZE AND THEN ADJOURN

Awaiting Arrival of Two Absent Members Before Final Action on All Officials.

Promptly on the stroke of 10 o'clock Senator Achi rose in the Senate Chamber, the old throne room of the Executive building, and with a few words moved that Senator Henry P. Baldwin be chosen as the temporary president of the body. The motion was carried without dissent and the extraordinary session of the second Senate of the Territory of Hawaii was on.

Eleven Senators were in their seats when the call for order followed the installation of the presiding official. The room which two years past was the home of the lower house of the Legislature, had been well arranged for the occupancy of the upper house. The arrangement was somewhat different, owing to the fact that only half the number of members had to be provided with seats. The chairman's position on the dais is the same and the secretary is on the floor directly in front. On the Waikiki and Ewa sides of the chamber are five desks each, while on the maki side of the square there are four desks and two aisles.

The Waikiki side of the chamber has been given over to the House Rulers and the desks there yesterday morning were occupied by Senators J. T. Brown, J. B. Kaohi and Luka Nakapahu. The seats near which will be those of D. Kalaokalani and S. E. Kaue were vacant, the former leisurely appearing just in time to vote to adjourn. Opposite these Senators sat D. P. R. Isenberg, L. L. McCandless and W. C. Achi, two seats vacant being those intended for Senators Cecil Brown and S. W. Wilcox. Facing the chairman the four seats, beginning at the Republican side, were occupied by Messrs. C. H. Dickey, J. D. Paris and C. L. Crabbe, the end one nearest the House Rulers being taken by Senator P. P. Woods.

When Senator Baldwin had called the session to order he suggested the election of a temporary secretary, which was done, L. L. McCandless placing before the meeting the name of William Savidge. Without dissent he was chosen. John Bush was then chosen interpreter and the temporary staff was complete.

On motion of Senator Paris the chairman was empowered to appoint a committee of three to investigate the credentials of the Senators, which motion carried and in accordance Chairman Baldwin named Senators Crabbe, Paris and Brown. The fact that there was no permanent organization made it necessary that the body adjourn at once, which was done the time fixed being this morning at the same hour.

The credentials committee at once got to work and inspected the papers submitted finding the men named as constituting the Senate for the session. One paper filed with the committee on credentials made it necessary that there be held yesterday afternoon another caucus of the members of the Senate. This was in the form of a protest from Stephen Desha, candidate from the First District, who alleged that there was a belief that a recount of the votes would show that he had been elected instead of J. D. Paris, who had only one majority over him. This protest was made by Desha in accordance with his opinion that there was such a feeling among his constituents that they would not be satis-

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